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No. 99-1848

In The

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Under Supreme Court Rule 24.2, the Respondents restate the question presented:

Is the catalyst theory a viable approach to govern federal courts in awarding fees under federal fee-shifting statutes?

LIST OF PARTIES

The list of parties as set forth in the Petitioners' Brief is accurate and will not be restated here.

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CITATION OF REPORTS

The citation of reports set forth in the Petitioners' Brief is accurate and will not be restated here.

JURISDICTION

The Petitioners properly invoke the certiorari jurisdiction of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions at issue in this case are accurately set forth in the Petitioners' Brief and will not be restated here.

STATEMENT OF THE CASE

The West Virginia Residential Board and Care Homes Statute (RBCH Statute), W. Va. Code § 16-5H-1 to -18, empowers the Secretary of the West Virginia Department of Health and Human Resources (or his or her designee) to, *inter alia*, enforce rules and standards for residential board and care homes which the Secretary has adopted, promulgated, amended or modified, to exercise as sole authority all powers relating to residential board and care homes' license issuance, suspension and revocation; and to enforce rules adopted, promulgated, amended or modified by the Secretary governing the qualification of applicants for residential board and care home licenses, including, but not limited to, educational requirements,

financial requirements, personal and ethical requirements. *Id.* § 16-5H-3(a)-(c).

The West Virginia Fire Control and Prevention Act, W. Va. Code §§ 29-3-1 to -25, creates the position of the West Virginia State Fire Marshal and the West Virginia State Fire Commission. The Fire Prevention and Control Act authorizes the Fire Commission to promulgate, amend and repeal regulations relating to the safeguarding of life and property from the hazards of fire and explosions. W. Va. Code § 29-3-5(a). The procedural mechanism for implementing this legislative directive is the West Virginia Administrative Procedures Act, found in Chapter 29A, Article 3 of the West Virginia Code (W. Va. APA).

Under the W. Va. APA, West Virginia's administrative agencies do not have the general and independent power to promulgate binding rules. Rather, with certain exceptions inapplicable here,[1] "legislative rules," (those having the force and effect of law) must be authorized by the West Virginia Legislature. *See* W. Va. Code § 29A-3-12. *See generally* 32 *The Council of State Governments, The Book of the States,* 122 n.*ll* (1998) (explaining that in West Virginia "State agencies have no power to promulgate rules without first submitting proposed rules to the legislature which must enact a statute authorizing the agency to promulgate the rule. If the legislature, during a regular session disapproves all or part of any legislative rule, the

[1] *See* W. Va. Code §§ 29A-5-15 to -15b (discussing "emergency rules"). For a general overview of the different types of rules in West Virginia, *see Appalachian Power Co. v. Tax Department,* 466 S.E.2d 424, 434 (W. Va. 1995).

agency may not issue the rule nor take action to implement all or part of the rule unless authorized to do so. However, the agency may resubmit the same or a similar proposed rule to the committee.")[2]

Under this authority, and prior to 1998, the Fire Commission promulgated certain regulations in the West Virginia Fire Code which included the term "self-preservation." W. Va. Code of State Rules, tit. 87, ser. 1, § 14.7.1. "Self-preservation" was defined to mean "A person is capable of removing his or her physical self from situations involving imminent danger, such as fire." *Id.* § 14.7. The West Virginia Residential Board and Care Homes (RBCH) statute also contained "self-preservation" language. W. Va. Code § 16-5H-1 (noting a state policy to encourage and promote resourcing to ensure the effective care and treatment of the physically or mentally impaired who depend on the care of others and who are capable of self-preservation); *id.* § 16-5H-2(*l*) (defining self-preservation as meaning "that a person is, at least, capable of removing his or herself from situations involving imminent danger, such as fire. . . . "); *id.* § 16-5H-2(j).

The Petitioners challenged the RBCH statute's self-preservation language and the Fire Code's self-preservation regulations. The Petitioners alleged the "self-preservation" language violated, and was pre-empted by the federal Fair Housing Amendments Act (FHAA), 42

[2] Many states have mechanisms that provide for legislative review of administrative rules, although not necessarily of the same type as West Virginia's. *Book of the States, supra* n. 1 at Table 3.26.

U.S.C. §§ 3601-3619, and Titles II and III of the Americans with Disabilities Act (ADA).

During the pendency of the litigation in district court, the West Virginia Legislature amended portions of the West Virginia RBCH statute by deleting the "self-preservation" language at issue in the case below. *See* I 1998 W. Va. Acts 983-986. The Legislature also amended the State Fire Code to delete any reference to "self-preservation." *See* II 1998 W. Va. Acts 1198-99. There is no evidence in the record to support petitioners' assertion that such changes were caused by the recognition that this lawsuit and persuasive expert discovery convinced the respondents that self preservation rules violated federal law.

The district court presiding over the litigation dismissed the case as moot in light of the legislative action. It also refused to award attorney's fees, considering itself bound by the Fourth Circuit precedent of *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (per curiam) (en banc), *cert. denied*, 513 U.S. 876 (1994). A panel of the Court of Appeals for the Fourth Circuit affirmed the district court's refusal on the basis of *S-1 and S-2*. The Court of Appeals subsequently refused the Petitioners' request for an en banc rehearing.

SUMMARY OF ARGUMENT

Although this Court has never spoken directly as to the validity of catalyst theory, the approach the Court took in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) is the test most consistent with the language of federal fee shifting

statutes, creates a proper respect for the Court's recognition that fee shifting statutes should be interpreted with an eye toward "easy administration," *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992), recognizes the Court's admonition that the fee application "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) and best harmonizes the public policies identified by this Court.

Farrar provides that to be a prevailing party:

> a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt* [*v. Helms*, 482 U.S. 755,] 760, 96 L Ed 2d 654, 107 S Ct 2672, [2675 (1987)], or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S Ct 2570, 2574, 65 L Ed 2d 653 (1980).

506 U.S. at 111.

The requirement of a judgment, consent decree or settlement makes judicial determination of prevailing party status easy and fair and avoids the possibility of prolonged and intrustive judicial examination of who is a prevailing party. A party under *Farrar* need only point to a judgment, consent decree, or settlement to establish prevailing party status.

Farrar's approach also protects the institutional interests of the popular branches of government. Public officials and legislators discharge their duties in light of multiple and varied considerations.

Catalyst theory discounts the interests these officials have in creating, implementing and administering public

policy in a political system that makes such officials accountable (either directly or indirectly) to the electorate. Catalyst theory risks subjecting public officials to intrusive, judicial inquiry concerning why they acted with the concomitant distraction of these officials from their duties and the chilling effect upon the exercise of their discretion. It also avoids opening a new avenue into the public treasury that would result in a diminution of vital government services.

ARGUMENT

1. The language of fee shifting statutes is clear and supports the Court's conclusion in *Farrar* that prevailing party status is established only by a judgment, consent decree or settlement.

"[The catalyst theory] doctrine has not yet been explicitly approved or rejected by the Supreme Court." *LaRouche v. Kezer*, 20 F.3d 68, 72 n.4 (2d Cir. 1994). This Court did not address the catalyst issue in *Hewitt v. Helms*, 482 U.S. 755, 763 (1987), saying, "We need not decide the circumstances, *if any*, under which this 'catalyst' theory could justify a fee award under § 1988. . . ." 482 U.S. at 763 (emphasis added).[3] However, the

[3] Congress has enacted over one hundred fee-shifting statutes. *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (appendix). When interpreting prevailing party statutes, this Court has concluded that they should all be given a common interpretation, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994), a viewpoint shared by the Congress. *See generally* 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 17.3 at 6 (2d ed. 1991) ("Congress and the Supreme Court alike have viewed § 1988 and other federal fee-shifting statutes that also provide for reasonable attorney's fees for the successful party in litigation as largely governed by the same interpretive standard.")

language of federal fee shifting statutes establishes that they do not encompass catalyst theory.

In interpreting a statute, the starting point is the language of the statute itself. *See, e.g., Williams v. Taylor*, 120 S. Ct. 1479, 1487 (2000) ("We start, as always, with the language of the statute.") There are two fee shifting statutes at issue in this case – the federal Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). The FHAA provides, in pertinent part, "In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2). The ADA provides, in pertinent part:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. § 12205. Each of these statutes authorizes the award of attorney's fees to "prevailing parties," not simply to anyone who acts as an agent for change or process or whose success comes in the political process – even if the political success was a response to the litigation. *Cf. Brown v. Local 58, I.B.E.W.*, 76 F.3d 762, 772 (6th Cir. 1996)

("We do not believe, however, that the catalyst theory was intended to allow recovery of fees for lawsuits that function as a kind of political advertisement.") Indeed, the legal term "prevailing party" is defined by one leading legal dictionary as "A party in whose favor a *judgment is rendered*, regardless of the amount of damages awarded. <in certain cases, the court will award attorney's fees to the prevailing party.>" *Black's Law Dictionary* 1145 (7th ed. 1999) (emphasis added). In short, a prevailing party is one who prevails *in* the litigation.

This Court has explained:

> [I]n *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), we synthesized the teachings of *Hewitt [v. Helms*, 482 U.S. 755 (1987)] and *Rhodes [v. Stewart*, 488 U.S. 1 (1988) (per curiam)]. "[T]o be considered a prevailing party within the meaning of § 1988," we held, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U.S., at 792, 109 S.Ct., at 1493. We reemphasized that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.' *Id.*, at 792-793, 109 S.Ct., at 1494.

Farrar v. Hobby, 506 U.S. 103, 111 (1992).

Farrar further explained that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The petitioner must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt [v. Helms,*] 482 U.S. [755,] 760, 107 S.Ct. [2672,] 2675 [(1987)], or comparable

relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980)." *Id.* "*Only under these circumstances* can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. *Garland, supra*, at 792-793, 103 L Ed 2d 866, 109 S Ct, at 1486." *Id.* (emphasis added).

In short, a plaintiff prevails when the plaintiff achieves "a material alteration in the legal relationship of the parties." This material alteration must be accomplished *in* the litigation – that is, the legal alteration is accomplished only when a federal court places the authority of the federal bench behind the alteration such that the failure of a defendant to follow through with the duties under the altered relationship is an affront to the authority of the federal court. Such judicial imprimatur is achieved only when there is a judgment, settlement or consent decree. *See Farrar*, 506 U.S. at 111.[4]

Because the language of the statutes at issue here is clear, the analysis should be at an end. *See, e.g., Harris Trust Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2191 (2000) (quoting *Hughes Aircraft v. Jacobson*, 525

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[4] The *Farrar* characterization of prevailing party as requiring a judgment captured not simply an agreement of only a majority of the bench, but the assent of all nine justices of the Court. Joel H. Trotter, Comment, *The Catalyst Theory of Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429, 1447 (1994) ("And not merely a majority, but all nine of the Justices applied the enforceable judgment requirement.")

U.S. 432, 438 (1999)) (" 'in any case of statutory construction, our analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well.' ") However, the Petitioners and their amici have cited both the House of Representative and Senate Committee Reports that accompanied § 1988. *See, e.g.*, Brief of Friends of the Earth, et al., as Amici Curiae in Support of Petitioners' at 13-14 (citing and quoting S. Rep. No. 94-1001, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912; H.R. Rep. 94-1558, at 7 (1976)); Brief for Public Citizen and the ACLU as Amici Curiae in Support of Petitioners at 11-12 (quoting H.R. Rep. 94-1588, at 7).

S. Rep. 94-1001, at 5, reads, in part, "[F]or purposes of an award of counsel fees, parties may be considered to have prevailed when they vindicate rights through consent judgment or without formally obtaining relief." H.R. Rep. 94-1558, at 7, read, in part:

> "A 'prevailing' party should not be penalized for seeking an out of court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed."[5]

However, section "1988's legislative history does not demand a catalyst theory at all but instead can be read merely to emphasize that a plaintiff should be able to

[5] The bill that became 42 U.S.C. § 1988 was originally S. 2278, 94th Cong. (1976). The Senate bill passed in lieu of the House of Representatives bill. *See* 1976 U.S.C.C.A.N. at 5908.

recover fees 'without formally obtaining relief,' " and, of course, a "plaintiff may still do so under *Farrar*, for a favorable settlement will confer prevailing party status." Trotter, *supra*, note 4, at 1447 & n.136. Indeed, non-formal relief as cited in the Senate Report accompanying section 1988 would, of course, include a voluntary settlement. In short, *Farrar* clarifies the "prevailing party" inquiry by stressing that a voluntary change in conduct must be accompanied by an enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of fee shifting statutes.

Finally, the use of legislative history in interpreting legislation is, at best, an exercise in futility and, at worst, a judicial usurpation of the legislative function. When Congress members vote, they vote on language in a bill – not upon committee reports. *See, e.g., Hirschey v. F.E.R.C.*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. S8659) (daily ed. July 19, 1982) (statement of Sen. Armstrong) (" . . . [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.") "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)), and there is no evidence that the statements in the Committee reports were voted on by Congress.

2. *Farrar* provides a sound rule for determining prevailing party status that is simple, fair and expeditious and pays due respect for the need of the popular branches of government to function without fear that their decisions will be retroactively linked to litigation.

A. Catalyst theory requires proof of causation between a lawsuit and an act of government and that connection cannot be established when a change in conduct is effected by a legislature.

The bright line test *Farrar* articulated is in keeping with this Court's admonitions that the fee application "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and that fee-shifting statutes should be interpreted with an eye toward easy administrability. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). The *Farrar* approach creates a bright line rule leading to ease of administration and conservation of scarce judicial resources. A prevailing party under the *Farrar* test is readily discerned by simple reference to a judgment, consent decree or settlement.

The dangers attendant to the catalyst theory are prodigious and risk the very results (long, drawn-out litigation that ensnares courts in complex legal and factual issues) which this Court's fee-shifting opinions have eschewed. Catalyst theory requires demonstration of a causal connection between a lawsuit and the action of the defendants. *See, e.g., Foreman v. Dallas County*, 193 F.3d 314, 323-24 (5th Cir. 1999). Catalyst theory is simply unworkable in cases such as this in which the change in conduct that forms the basis of the prevailing party claim consists of legislative action. Public officials act for a

variety of reasons. Linking legislative action to a lawsuit fails to appreciate the diversity and dynamics that motivate legislators.

Causation in the law is the general concept that "there be some reasonable connection between the act . . . of the defendant and the damage which the plaintiff has suffered." *W. Page Keeton, et al., Prosser & Keaton on the Law of Torts* § 41, at 263 (5th ed. 1984). "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." *Id.* This Court has recognized that the government's decision to settle a case (even if on unfavorable grounds) does not equate with being motivated by the suit. Other grounds, such as a change in policy instituted by a new administration, could just as easily account for the change. *Pierce v. Underwood*, 487 U.S. 552, 568 (1988). A judicially enforceable order placing judicial authority behind the resolution of the case negates any need for possibly expensive, time-consuming and intrusive judicial inquiry into who is a prevailing party.

Here, it was not a party who acted, but a state legislature.[6] When a representative governmental body acts, it

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[6] The separation of powers it is an explicit constitutional command of West Virginia's organic charter. W. Va. Const. art. 5, § 1. *See State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 589 (W. Va. 1995) ("The separation of powers doctrine expressly stated in our constitution is a core principle of our system of government . . . "). The West Virginia Constitution not only creates a tripartite governmental system, it creates a diffusion within the branches of government as well, establishing a bicameral legislature, W. Va. Const. art VI, § 1, and a non-

acts as a body, not a conglomeration of individuals. *Cf. Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 545 (1986) (individual member of school board lacked standing to appeal an order when the board did not vote to appeal order). Indeed, this Court has recognized, "[i]nquiries into Congressional motives or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), as legislators act for a variety of reasons. *See Michael M. v. Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion). *See also Foreman v. Dallas County*, 193 F.3d 314, 321-22 (5th Cir. 1999) (recognizing that attribution of a causative relationship between a lawsuit and a legislative act is a hazardous undertaking as the legislative process is fraught with compromises, competing interests and unspoken motives). As this Court correctly observed more than a century ago, "[t]he diverse character of such motives, and the impossibility of penetrating

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unitary executive. *Id.* art. VII, §§ 1 & 2. West Virginia, far from creating a monolithic governmental structure, has chosen to diffuse authority to prevent that "accumulation of all powers . . . in the same hands . . . " that "may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 269 (James Madison) (Clinton Rossiter ed. Mentor 1999). This separation also enhances political accountability. If the divisions of government are blurred or erased, the citizenry will not be able to discern who is the responsible (and, hence, accountable) actor in the polity, further diluting government accountability to the electorate. Thus, when an actor of the state acts, it may act for the state, but only within the sphere of the state actor's authority. If, however, the Respondents are seen to act as the state in proposing legislation, they may be entitled to the cloak of absolute legislative immunity.

into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885). *See also Boos v. Barry*, 485 U.S. 312, 336 (1988) (Brennan and Marshal, JJ., concurring) ("The . . . analysis . . . plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry. . . . "). Catalyst theory, however, directly places legislative motivation into issue before the courts, which is a result at odds with the recognitions of this Court and accepted rules recognizing the hazards of such inquiry.

As a general evidentiary matter, individuals are limited to giving testimony on matters of which they have personal knowledge. *See* Fed. R. Evid. 602. Thus, while an individual legislator may testify as to why he or she personally voted in a particular matter[7], that legislator is not competent to testify as to the motives of other legislators or, for that matter, the legislative body as a whole. *Cf. State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 699 (1st Cir. 1994) (recognizing, *inter alia*, that Congressmen "cannot be expected to be familiar . . . with every other legislator's thoughts as to what the bill accomplishes (or stops short of accomplishing))." All of

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[7] Of course, judicial inquiries into legislative motivation typically lead to dead ends. For example, in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 n.11 (4th Cir. 1979), the court of appeals explained that a bill's sponsor provided an affidavit attesting that he introduced the bill in the hope that it would ameliorate the conditions found in adult entertainment establishments. Two print reporters provided affidavits that attested the sponsor told them that the aim of the bill was to cut the profits of these businesses and drive them out of business.

which assumes legislators may be amenable to motivational inquiry by the judiciary – a conclusion much at odds with the historic practice of the federal courts. "The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L ed 162, 176 that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). *See also Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998) (quoting *Tenney*, 341 U.S. at 377).

Likewise, after-the-fact affidavits are accorded no probative weight because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act.' " *Bread Political Action Committee v. F.E.C.*, 455 U.S. 577, 582 n.3 (1982) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), quoting *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 639 n. 34, 87 S.Ct. 1250, 1265, 18 L.Ed.2d 357 (1967)). Even contemporaneous statements of legislative sponsors are of questionable value. *Overseas Educ. Ass'n v. F.L.R.A.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley & Starr, JJ., concurring) (emphasis in original) ("Far less reliable, as sources of statutory meaning, are remarks made during floor debate – even 'authoritative' explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision.")[8] Catalyst theory

[8] And which presupposes that the speakers' views are even aired to his or her colleagues. *See* 112 Cong. Rec. S8795 (daily ed. July 25, 1996) (statement of Sen. McConnell) ("I do not see anyone on the Democratic side.") *See also Overseas Educ. Ass'n, Inc. v. F.L.R.A.*, 876 F.2d at 975 (concurring opinion) ("Few of his fellow legislators will have been on hand to hear the gloss the sponsor may have placed on a particular provision.")

is simply unworkable in cases such as this where legislative action is the purported basis for prevailing party status. As *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) incisively notes:

> The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes. We agree with the cases that have refused to credit the change in law to a claimant's individual law suit and found the nexus between Congress's action and the law suit too attenuated.

See also Petrone v. Secretary of Health and Human Services, 936 F.2d 428, 430 (9th Cir. 1991) (per curiam); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988); and *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (per curiam). Indeed, without evidence that the government actor who took the action that mooted the case even knew of the suit (much less was motivated by it), an award of attorney's fees is unsupportable. *See New York State Ass'n of Career Schools v. State Educ. Dep't*, 762 F. Supp. 1124, 1127 (S.D.N.Y. 1991).

B. *Farrar* is consistent with the institutional concern this Court has shown for the effect that litigation has on government officials whose time and energies will be diverted from their public duties and whose decisions will be inhibited by the specter of the litigation.

This Court has recognized that litigation against government officers distracts them from their public duties, inhibits their discretionary actions and deters other able individuals from seeking public service. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982). While *Harlow* addressed immunity, its rationale should help to guide this Court in the resolution of the catalyst theory issue. Indeed, this Court has looked to the immunity doctrine for guidance in cases where the immunity doctrines themselves were not directly involved. Thus, in *Spallone v. United States,* 493 U.S. 265, 278 (1990), this Court looked to the immunity doctrines as a guidepost governing the lower court's discretion in holding non-party city council members in contempt of court for failing to vote in favor of legislation to implement a consent decree entered into by the (party-defendant) city.

The dangers articulated in the immunity cases of distracting public officials from the discharge of the public weal are magnified when viewed in the context of directly representative bodies (such as the state legislature at issue in this case). The majority of state legislators serve only part time. *See* Rich Jones, *State Legislatures, in* 30 *The Council of State Governments, The Book of the States* 100 (1994) (citing a 1993 study by the National Conference of State Legislatures where 15% of legislators reported the legislature as their sole occupation, which

would increase to 24% if other categories [such as student or homemaker] were included). If these legislators were compelled to submit to interrogation in fee determination litigation, they would either have to testify during the legislative session (distracting them from the high responsibility of representing their constituents) or during non-legislative time (distracting them from their other occupations and creating an additional disincentive to their service in the legislature). And, it is highly doubtful whether legislators could even be compelled to so testify. *See, e.g., Bogan,* 523 U.S. at 54-55.

Moreover, the specter of judicial interference in government programs is manifest. Catalyst theory discourages public officials from exercising their public trust to take the initiative in revising outmoded ordinances or statutes or in improving institutional conditions, that are indisputably core government functions because under the catalyst theory such actions could serve as a proper basis for a fee award. Catalyst theory empowers courts to award fees for any change in behavior occurring after a lawsuit is filed – whether or not the court could have ultimately ordered that change in conduct or whether that conduct had previously survived judicial scrutiny. Thus, catalyst theory disables public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorney's fees. It is counterproductive to convert attorney's fees into a penalty on state and local officials for making salutary changes. As this Court has cogently emphasized, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic

process." *Spallone*, 493 U.S. at 279 (citation omitted). While this Court, as an empirical matter, found it questionable whether loss of government entity funds due to judicial order would deter a public officer of a conscientious exercise of his or her duties, *Owen v. City of Independence*, 445 U.S. 622, 656 (1980, several dissenting justices noted that the government paralysis occasioned by judicially exacted payments from the public treasury would, indeed, act to chill the judgment of committed public servants. *Id.* at 668-69 (Powell, J., dissenting). Whether the money is called damages or fees, its effect is the same. *Cf. Pulliam*, 466 U.S. at 545 ("Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' of $7,691.09 or 'attorney's fees' in that amount.").

Indeed, the perverse results of catalyst theory are evidenced by the decisions of some lower courts. For example, In *DiMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982), a plaintiff sued a sheriff in Virginia over the Sheriff's strip search policy. The policy had recently survived a separate suit. *Id.* at 93. During pendency of the *DiMier* suit, the Sheriff agreed to a temporary cessation of the policy and, subsequently, the Virginia General Assembly voted into existence legislation curtailing the circumstances supporting strip searches. *Id.* at 92. In affirming an award of attorney's fees, the Court of Appeals concentrated its discussion not on the legal merits of the case but upon " . . . the numerous exhibits of newspaper articles and editorials submitted by appellees," which evidenced that the "suit caused considerable publicity, both locally and nationwide, and 'increased political pressure' regarding the policy." *Id.* at 93. The threat of

retroactively enforced attorney fee awards after a government body acts as a result of the political process skews the relationship between the federal courts and the states and injects the federal judiciary into the popular and democratic political system which cannot help but "undermine[ ] the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone*, 493 U.S. at 279. Legislators must be "free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). Indeed, "harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees." *Pulliam v. Allen*, 466 U.S. 522, 555 (1984) (Powell, J., dissenting).

3. The adoption of the *Farrar* approach will not adversely affect plaintiffs but will continue to provide a means of vindicating the interests of the individuals as private attorneys general.

The adoption of *Farrar's* well-reasoned and cogent approach to prevailing party analysis will not leave prevailing plaintiffs without access to attorney's fees. Upon a judicial determination which vindicates their rights, as evidenced by a judgment, settlement or consent decree, plaintiffs will have established their status as prevailing parties with a concomitant entitlement to attorney's fees.

Further, there exist intrinsic and extrinsic political checks that would act as a brake upon a defendant simply deciding to cease the conduct at issue in the case in order to avoid attorney's fees. Intrinsically, when a government

defendant simply ceases a policy or program which is the subject of a suit, that defendant has surrendered the enforcement of a program to which he or she is politically committed. Such a surrender would necessitate a justification for the act before that defendant's constituency. The defendant's political accountability is a factor he or she would have to consider in their decision. Extrinsically, a government defendant not only has to justify his or her acts to their constituency, but will have to justify that act in simply abandoning a policy or program to either his or her political superiors (such as the executive or administrative agency heads) or the legislature or other representative body. A government defendants' continued political authority (or even continued political existence) is dependent upon the support of these other agents of government. The abdication of a policy, program or rule would necessitate justification extrinsic to the defendant through the defendant's superiors.[9]

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[9] Most governments comprising the United States (states, counties and municipalities) live within budgets and lack the ability to confront fiscal shortfalls by printing money to supplement the public fisc. When faced with financial shortfalls, they must rely upon measures that either raise taxes or detrimentally affect the essential services of government upon which the population relies. *See, e.g.*, Greg Moore, *Goldman to Lay Off Eight City Workers, Official Says*, Charleston (W. Va.) Gazette, Nov. 28, 2000, at C1 (detailing West Virginia Capitol City's budget shortfall and explaining that jobs would be cut, positions not filled and neighborhood and community centers would reduce their hours of operation).

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

The Plaintiffs moved for attorney's fees in the District Court under the catalyst theory. The District Court held that it was precluded from any such award based upon *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994). The Plaintiffs now request this Court to consider the statutes at issue, this Court's prior decisions, a majority of the Courts of Appeals decisions, and hold that a party is deemed to have prevailed if there was a material alteration of the legal relationship between the parties that was caused by the lawsuit and the lawsuit was not frivolous, unreasonable, or groundless. This standard comports with the Congressional intent that private attorneys general be encouraged to file civil rights lawsuits in order that the public may be vindicated when laws are enforced.

The Defendants' Brief argues that the catalyst theory should be rejected under their view of *Farrar v. Hobby*, 506 U.S. 103 (1992). They argue that *Farrar* should be extended to establish a "bright line" test limiting the term "prevailing party" to one who achieves a judgment, settlement, or consent decree. They argue that this simple standard is preferable to the confusion that is engendered by the use of the catalyst theory. Alternatively, the Defendants assert that this Court should endorse a per se rule that attorney's fees are not available under the catalyst theory when a case is mooted by legislative action.

The catalyst theory has been embraced by the federal courts for over thirty years and this Court should hold that those

decisions are consistent with the intent of Congress. The Plaintiffs' seek nothing more from this Court than an affirmance of the catalyst theory and a remand to the District Court for consideration of their fee request. This Court should continue to allow development of the catalyst theory on a case by case basis and reject the Defendants' suggestion that a per se rule is necessary to preclude attorney's fees in all cases involving legislative action.

ARGUMENT

I. THE CATALYST THEORY IS CONSISTENT WITH THE PLAIN MEANING OF THE TERM "PREVAILING PARTY."

Both of the statutes at issue in this case, 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, allow an award of attorney's fees to a "prevailing party." In the Plaintiffs' initial brief, they assert that under this Court's prior decisions, the legislative history of these two statutes, and, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the term "prevailing party" encompasses the catalyst theory. The Defendants' Brief argues that this Court should eschew that legislative history and look only to the plain meaning of the term "prevailing party." Under their view, Congress did not intend to allow a recovery of attorney's fees under the catalyst theory. The Defendants further argue that this Court should extend its decision in *Farar* to hold that only when a party

achieves a judgment, settlement, or consent decree are they entitled to recover their attorney's fees. They argue that this simple standard will eliminate any confusion in the courts that may result from the use of the catalyst theory.

The Defendants and the *Amici* in Support of Respondents all argue that this Court should not accept the catalyst theory because the decision in *Farrar* restricts attorney's fees in civil rights cases involving only judgments, settlements and consent decrees. They argue that this provides a simple standard that may be easily implemented by the courts below without any confusion. This interpretation of *Farrar* is at odds with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194 (2000), wherein it was recognized that *Farrar* "involved no catalytic effect." This statement explicitly recognizes that *Farrar* did not address the catalyst theory which arises in this case. Further, as this Court recognized in *Aleyska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), it is for Congress, not the Courts to establish the rules related to attorney's fees. Since Congress clearly endorsed the catalyst theory when it enacted § 1988 and the two statutes at issue in this case, this Court must uphold those enactments. This Court should reject the invitation of the Defendants and the *Amici* to create a standard to the contrary.

The Defendants' Brief, at pages 7-8, asserts that this Court should do nothing more than look at the plain language of the two statutes at issue and conclude:

> Indeed, the legal term "prevailing party" is defined by one leading legal dictionary as "A party in whose favor *a judgment is rendered*, regardless of the amount of damages awarded. <in certain cases, the court will award attorney's fees to the prevailing party.>" *Black's Law Dictionary* 1145 (7th ed. 1999). In short, a prevailing party is one who prevails *in* the litigation.

This Court should not ignore the legislative history of the statutes at issue.[1] Instead, it should look to the legislative history of § 1988 as it has done in prior cases. This Court has consistently referred to the legislative history of § 1988 to discern the meaning of the term "prevailing party." *See e.g.*

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[1] In support of their argument that legislative history has no relevancy to this Court's inquiry, the Defendants cite to Justice Scalia's concurring opinion in *Hirschey v. F.E.R.C.*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985). Justice Scalia frequently objects to this Court's consideration of legislative history. *See e.g. Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288, 2302 (2000)(Scalia, J. concurring) and *Bank One, Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J. concurring). This Court has continued to consider legislative history in appropriate cases. *See e.g. Crosby, supra* at 2301, n.23 (legislative history of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 570, 110 Stat. 3009-166); *Jones v. United States*, 526 U.S. 227, 237-38 (1999) (legislative history of the federal carjacking statute, 18 U.S.C. § 2119); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 342 (1999) (legislative history of the Census Act, 13 U.S.C. §§ 1, *et seq.*); *Bank One, Chicago, supra* at 273, (legislative history of the Expedited Funds Availability Act, 12 U.S.C. §§ 4001, *et seq.*) *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993) (legislative history of the Kansas Act, 18 U.S.C. § 3243).

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989); *Hensley v. Eckerhart*, 461 U.S. 754 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); and, *Hanrahan v. Hampton*, 446 U.S. 754 (1980). *See also*, *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (legislative history of § 1988 considered at length regarding proper calculation of reasonable attorney's fees).

The Plaintiffs' initial brief sets forth their arguments that the legislative history of § 1988 and the two statutes at issue shows that Congress intended the term "prevailing party" to encompass an award of attorney's fees under the catalyst theory and this Court should adhere to that intent. Similar arguments regarding the legislative history of § 1988 and the statutes at issue are made by the *Amici* in Support of the Petitioners. *See* U.S. Brief at 9-10, n.4 and 21-22; Friends of the Earth Brief at 13-15; and, Public Citizen at 9-11.

Defendants do not dispute or address the Plaintiffs' assertion that the catalyst theory first arose from the decision in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970) and that the theory has been applied for thirty years in the federal courts across this country. The Brief of *Amici* National Conference of State Legislatures in Support of the Respondents, at pp. 12-13, invites this Court to examine the decision in *Parham*. That *Amici* asserts that *Parham* is consistent with their interpretation of *Farrar* that attorney's fees are only to be awarded in cases involving judgments, settlements, and consent decrees. Based upon this assertion,

the *Amici* argues that citation to *Parham* in the legislative history of § 1988 should not been seen as supporting the Plaintiffs' argument that Congress has endorsed the catalyst theory.

There is no doubt that the plaintiff in *Parham* never obtained any judgment, settlement or consent decree. Both the District Court and the Court of Appeals concluded that no final injunctive relief was warranted because the defendant's voluntary conduct eliminated any discriminatory conduct against African-Americans, *supra* at 429. Thus, when Congress cited to *Parham*, and stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*." S.Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (emphasis added), it undoubtedly intended to recognize that a plaintiff is entitled to attorney's fees when their lawsuit leads to voluntary changes of unlawful conduct on the part of the defendant.[2]

The House Report, No. 1558, 94th Cong., 2d Sess. at 7 (1976) more forcefully relies upon *Parham* stating

[2] The Defendants' Brief, pp. 10-11 discusses this same passage of legislative history and suggest the language "without formally obtaining relief" only applies to settlements. Had Congress intended this limitation to settlements, it could have easily stated "or settlements." It did not so state. Rather it used very broad language "without formally obtaining relief," which includes settlements and the catalyst theory. Citation to *Parham* further evidences that Congress intended to allow the catalyst theory when it enacted § 1988 and the two statutes at issue in this case.

unequivocally that "[s]imilarly, after a complaint is filed a defendant might voluntarily cease the unlaswful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed." When a plaintiff's lawsuit catalyzes a defendant into making changes consistent with the relief requested, there should be no dispute that Congress intended that they be considered a prevailing party the same as any other party who obtains a judgment, settlement or consent decree.

Even if this Court were to limit its inquiry to the express terms of the statute, as suggested by the Defendants, under the plain meaning of the term "prevailing party," the catalyst theory would be allowed. Significantly, when Congress enacted 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, it did not define the term "prevailing party" or place any restrictions on that term. Congress does not itself use the terms judgment, settlement, or consent decree in the statutes. Nor did Congress restrict the term "prevail" to conduct "*in* the litigation." Absent any restrictive language from Congress, this Court should not read in any such abridgments.[3]

[3] The *Amici* Alliance of Automobile Manufactures, Inc., at pp. 17-22, argue that not all fee shifting statutes use the same language. They state that the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2) provides "[i]f a consumer finally prevails in any action . . . he may be allowed by the court to recover as a part of the judgment" his attorney's fees. Were the term "judgment" included in the statutes at issue, the Defendants might have a different argument. However, the language of the Magnuson-Moss Warranty Act is not before this Court.

Furthermore, the definition of the term "prevail" has several meanings that support the catalyst theory.[4] A common first definition of the term "prevail" is to "become very strong, to gain vigour or force, to increase strength." *See Oxford English Dictionary* 1334 (1970), *See also, Random House Webster's Unabridged Dictionary* 1534 (2nd ed. 1987). Dictionaries also define the term "prevail" as "to get the better, to be victorious" and "to succeed in persuading, inducing or influencing." *Id.* These definitions support the catalyst theory. If a lawsuit induced or catalyzed the outcome that the plaintiff sought in the lawsuit, the plaintiff has prevailed.

The Plaintiffs lawsuit induced or catalyzed the Defendants to withdraw the self-preservation rules and under that definition, they can be seen as prevailing parties. Prior to any suit being filed, the State Fire Marshal adhered to the outdated self-preservation rules for eleven years after the National Fire Protection Association (NFPA) had issued the 1985 Life Safety Code standards for residential care homes. This caused the Office of Health Facility Licensure and Certification (OHFLAC) to issue three Cease and Desist Orders on October 18, 1996 requiring Buckhannon Board and Care

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[4] The Defendants' Brief refers this Court to the definition of the term "prevailing party" in *Black's Law Dictionary* 1145 (7th ed. 1999). This definition is found under the definition of "party," not the term "prevail." The term "prevail" is defined in *Black's Law Dictionary* at 1206 as "[t]o obtain the relief sought in an action; to win a lawsuit." While this definition of "prevail" would include judgments, it also is arguably compatible with the Plaintiffs' claim that the catalyst theory is encompassed by the term "prevail."

Home (BBCH) to close its three residential care homes and expel all of its residents. (JA 46-66). Rather than comply with these orders, the Plaintiffs proceeded to District Court and obtained an Agreed Order prohibiting the closure and eviction of the residents.

The Plaintiffs prevailed by obtaining the entry of the Agreed Order. The Plaintiffs further prevailed when the District Court denied the Defendants' Motions to Dismiss (JA 102). Finally, the Plaintiffs prevailed when the State Fire Marshal decided after his deposition, and the depositions of the Plaintiffs' experts, to withdraw the self-preservation rules at issue. This is clearly a material alteration in the legal relationship between the parties that was caused by the lawsuit. Further, and most significantly, Plaintiff Dorsey Pierce was allowed to die with peace and dignity at BBCH at the age of 105, and no other persons in a residential care home in West Virginia were subject to evictions as a result of the rules.

In light of the plain meaning of the term "prevailing party," this Court should reaffirm that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. The Plaintiffs in this action clearly induced or catalyzed the Defendants into withdrawing their self-preservation rules and therefore, this Court should conclude that they are prevailing parties entitled to a hearing on their request for fees.

II. THE CATALYST THEORY HAS BEEN APPLIED FOR OVER THIRTY YEARS WITHOUT ANY CONFUSION OR DIFFICULTIES.

The Defendants and their *Amici* in Support have repeated the same four arguments against the catalyst theory first advanced by Chief Judge Wilkinson in his dissent in *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993). The Plaintiffs addressed these arguments in their brief at pp.33-34. One of the arguments advanced by the Defendants and the *Amici* in Support of the Respondents, suggest that if this Court endorses the catalyst theory, it will open the floodgates of civil rights and other litigation across the country. It is pure conjecture that any litigation will increase as a result of the catalyst theory. No empirical evidence is offered by the Defendants or the *Amici*, that the catalyst theory has resulted in any additional civil rights litigation over the past thirty years.

This argument also ignores the fact that the catalyst theory is already the law in all circuits with the exception of the Fourth Circuit, which circuit also accepted that theory until the *en banc* decision in *S-1 and S-2* in 1994. This Court's decision to reaffirm the catalyst theory should preserve the *status quo* that has now existed for thirty years and one would not expect any increase in civil rights litigation.

Likewise, there is no empirical support for the Defendants' contention that the courts are confused in applying

the catalyst theory. A review of the case law that has developed over thirty years indicates that the district courts and courts of appeals apply the catalyst theory in an even handed manner. A majority of the courts have applied the *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) two part test without any confusion or discernable difficulty. *See* Pet. Brief at 31, n.13.

Lastly, Defendants argue that the catalyst theory inhibits public officials from voluntary action. Again, there is no empirical evidence offered by the Defendants or their *Amici* to support this assertion. When an agency is not in compliance with federal law, and that leads to litigation, a public officials actions to remedy the problem should be seen as induced or catalyzed conduct, not voluntary conduct. And under those circumstances, an award of fees is appropriate.

Furthermore, the facts of this case do not support the Defendants' argument. The District Court held as a matter of law that the Plaintiffs' Amended Complaint stated a valid cause of action under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, *et seq*. and the Americans with Disability Act OF 1990, 42 U.S.C. §§ 12132, 12182 (JA 102). Only after this lawsuit was filed and the depositions of the State Fire Marshal and the Plaintiffs' experts took place, did the State Fire Marshal determine that it was time to withdraw the outdated rules.

After declaring the suit moot, the District Court held that it could not consider the Plaintiffs' fee request under the

catalyst theory because of the decision in *S-1 and S-2*, although he further opined that the Plaintiffs "might prevail on this theory" (Pet. App. A17). The District Court did not find that the State Fire Marshal's conduct was entirely without blame, particularly in light of the fact that the self-preservation rules were withdrawn without notice to the plaintiffs, their own counsel and the court. In upholding Rule 11 sanctions against the State Fire Marshal in this case, the District Court implicitly recognized that the rule change was related to this lawsuit (JA 147).

III. THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

The Plaintiffs filed their Petition with this Court in order that their fee request could be considered in the District Court under the catalyst theory. The Plaintiffs have argued, as this Court stated in *Friends of the Earth, Inc., supra,* at 195, that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." Despite that admonition, the Defendants have devoted a substantial portion of their Brief, pp. 12-17, to the proposition this Court should adopt a *per se* rule precluding fees in any case involving legislative activity. There is no basis for carving out an exception to the catalyst theory where the action that brought about the relief sought by the plaintiff was legislative action. Neither the statutory language or the legislative history suggests a different result if the relief sought in the lawsuit was obtained

through legislative action. Furthermore, the relief obtained here was not through legislative action. In the Plaintiffs' initial brief, at footnote three, the Plaintiffs explained that any legislative activity in this case is merely routine, mechanical oversight of rule-making in West Virginia. Therefore, the Defendants attempt to hide behind legislative activity in this case should be seen as oversimplified at best.[5]

The Defendants' arguments on legislative involvement in this case also overlooks two important points regarding West Virginia's rule-making process. First, the Defendants do not dispute the Plaintiffs' assertion in footnote three of the initial brief, that the vast majority of rules go through the legislature with little discussion or amendment. The second, and more significant point, is that this whole process is agency driven, *i.e.* the agency must promulgate the rules prior to the legislature having anything to act upon. A review of the exhibits attached to the Plaintiffs' Motion for attorney's fees establishes that the expected mechanical legislative oversight of the rule-making process under the West Virginia Code is precisely what occurred in this case. First, the State Fire Marshal proposed

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[5] The laws in West Virginia regarding the rule-making process are simple and straightforward. Pursuant to W. Va. Code § 29A-3-9, an agency must first draft a proposed rule and then apply to the legislature for permission to promulgate the rule. W. Va. Code § 29A-3-11 next sets forth the procedure for the Legislative Rule-Making Review Committee to consider in recommending to the full legislature that the agency should be allowed to promulgate the requested rule. W. Va. Code § 29A-3-12 then sets forth how the legislature as a whole may approve or disapprove of the rules or may otherwise amend the rules.

rules to the State Fire Commission. The Commission in turn submitted proposed rules to the Legislative Rule-Making Review Committee and finally, the legislature as a whole approved the rules with little substantive changes.

Therefore, this is a case about agency conduct, not legislative activity. This Court should recognize that upon remand, the District Court may only focus on the State Fire Marshal and the State Fire Commission's decision to withdraw the self-preservation rules and not the actions of the West Virginia Legislature approving of those changes. Alternatively, the District Court may focus on the fact that the lawsuit prevented the Defendants from enforcing their Cease and Desist Orders from the inception of the lawsuit, until it was dismissed as moot.

Not only are the Defendants' arguments not factually supported in this case, they are also misplaced as a matter of law. There is no indication in cases applying the catalyst theory that courts have had difficulty applying it to cases involving legislative action such that a *per se* exception is warranted. Defendants argue that the determination whether legislative action was catalyzed by a lawsuit will inevitably be "complex," "intrusive," "long, drawn-out" and "unworkable." Defendants' Brief at pp. 12-13. While it may sometimes be difficult to determine whether legislative action was catalyzed by a lawsuit, that is also sometimes true with regard to agency actions and at other times the determination will be easy.

Four of the cases cited by Defendants involved claims that individual lawsuits had catalyzed enactment of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794; the courts easily concluded that no individual plaintiff could establish that his lawsuit was the catalyst for this major congressional action. *See Milton v. Shalala*, 17 F.3d 812 (5th Cir. 1994), *Petrone v. Secretary of Health and Human Services*, 936 F.2d 428 (9th Cir. 1991) (*per curiam*), *Hendricks v. Bowen*, 847 F.2d 1255 (7th Cir. 1988), and *Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988). Similarly, in *New York State Association of Career Schools v. New York State Education Department*, 762 F.Supp. 1124 (S.D.N.Y. 1991), the court denied fees where there was simply "no evidence that either the Legislature or the Governor was at all aware of plaintiffs' lawsuit, let alone moved to enact the reform legislation as a result of it." *Id.* at 1126-27. And in the other case cited by defendants, *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999), the court concluded that the plaintiffs were not catalysts because there was "no ... evidence in the legislative record" showing that the lawsuit was a significant basis for the action, and that "the ... legislature began the process of amending the [relevant statute] well before the plaintiffs initiated this action." *Id.* at 322.

Other courts have had equally little difficulty finding that litigation was the catalyst for legislative action. For example, in *Church of Scientology v. City of Clearwater*, 2 F.3d 1509 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994), the court found it "*undisputed* that the suit brought by

[Plaintiff] caused the City to amend the [unconstitutional] Ordinance." 2 F.3d. at 1513 (emphasis added). And *Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993), the court ordered fees awarded under a catalyst theory where "Congress specifically mentioned the case in the legislative history [of the amended statute] as being the "necessary" force behind its enactment." *Id.* at 241.

Finally, Defendants' policy-based argument that a legislature should be free to act in the public interest without facing the constraint of a potential fee award has no more force than the same argument made in regard to an executive official, who should also act in the public interest. Congress has made the judgment that attorney's fees should be available to prevailing parties in civil rights litigation, and that is the relevant public policy to be applied here.

Thus, there is no inherent obstacle to applying the catalyst theory to cases involving legislative action and this Court should reject a *per se* rule precluding awards of attorney's fees in such cases. In any event, this case should be remanded to the district court to make an appropriate determination under the catalyst theory.

IV. THE *NADEAU* TEST IS THE BETTER STANDARD UNDER THE CATALYST THEORY FOR CONSIDERATION OF A MOTION FOR ATTORNEY'S FEES.

The Plaintiffs' initial brief, at pages 40-43, asserts that this Court should follow the *Nadeau* two part test as the proper standard to be applied under the catalyst theory. This standard is used by a majority of the courts and it has been cited previously with approval by this Court. The Defendants have not addressed this argument but, the Solicitor General's Brief, at pp. 27-29, has proposed a different standard.

The Solicitor General argues that a plaintiff whose lawsuit induces voluntary compliance should only obtain attorney's fees if the suit had "legal merit." U.S. Brief at 27. This standard extends beyond the second part of the *Nadeau* test that only examines whether the legal premise of the suit was not "'frivolous, unreasonable, or groundless.'" *Nadeau, supra* at 281 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)). This test "requires courts to dismiss fee claims based wholly on frivolous lawsuits, but simultaneously constrains them from holding a full trial, or from making *ad hoc* predictions about [a] plaintiff's chances for success, on the merits." *Miller v. Staats*, 706 F.2d 336, 341 n.31 (D.C. Cir. 1983).

The *Nadeau* two part formulation has been followed in almost every circuit, in cases interpreting a variety of similarly worded federal fee-shifting statutes under which attorney's fees may be awarded to the prevailing party. Under it, courts have established a minimal threshold for testing the substantiality of a federal claim, and they have expressly rejected a searching

review to determine whether the plaintiff would have won on the merits of the claim.[6]

Although the U.S. Brief at 27 n.14, cites *Nadeau* with apparent favor, it goes on to ask this Court to adopt the standard: "whether the plaintiff's complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction *or* failure to state a claim on which relief may be granted." Brief at 27 (citing Fed. R. Civ. P. 12(b)) (emphasis added). This Court should reject this rule for two reasons.

First, while this standard is met in this case, some cases may be concluded prior to any ruling on a motion to dismiss. Utilization of this standard then will effectively require the fee-seeking party to obtain a legal ruling on the merits after the case has been adjudged moot. Indeed, for the courts to stray beyond *Nadeau* in cases that are moot on the merits would appear to require them, in effect, to issue advisory opinions.

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[6] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992) (not "frivolous or groundless"); *Associated Builders & Contractors of Louisiana v. Orleans Parish School Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (lacks "colorable merit"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990) (not "frivolous, unreasonable, or groundless"); *Sablan v. Department of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988) (same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983) ("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982) (not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981) *cert. denied* 455 U.S. 993 (1982) (not "frivolous, unreasonable, or groundless"); *Staten v. Housing Authority of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980) ("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (not "frivolous, unreasonable, or groundless").

Second, adopting a Rule 12(b)(6) standard as suggested by the Solicitor General is at odds with this Court's prior holding in *Maher v. Gagne*, 448 U.S. 122 (1980), wherein this Court affirmed an award of fees under § 1988 to plaintiffs who had obtained a consent decree, and would set a higher standard for an award of fees in catalyst cases than in cases resolved through consent decree. In *Maher*, the defendant's argued that fees could not be awarded where no formal judicial relief on the merits had been entered. This Court rejected that argument and strongly suggested that the settlement of non-frivolous claims, without more, is sufficient to entitle plaintiffs to fees. It is difficult to square *Maher* with a standard that requires district courts to decide the legal merits of cases in the context of fee disputes.[7]

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[7] The Rule 12(b)(6) approach is also at odds with this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA provides the government with an unusual defense if it can show that its position on the merits was "substantially justified." But even under EAJA, this Court has cautioned other courts against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce, supra* at 561. If, under EAJA, where the statutory defense demands that the district court look at the merits to some degree, this Court has said that legal rulings on the merits should not be announced in resolving fee disputes, there is no basis for a standard requiring merits determinations in mooted cases where the only requirement is that the plaintiff has prevailed.

CONCLUSION

Based upon the foregoing, this Court should hold that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. This Court should remand this case to the district court to consider the Plaintiffs' request for attorney's fees.

Respectfully submitted,

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